

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Arthur Albano	Team: Team # 3	CCRB Case #: 201400407	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input checked="" type="checkbox"/> Injury
Incident Date(s) Wednesday, 01/08/2014 6:45 PM	Location of Incident: Inside the 40th Precinct stationhouse	Precinct: 40	18 Mo. SOL 7/8/2015	EO SOL 7/8/2015	
Date/Time CV Reported Wed, 01/08/2014 8:25 PM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 01/14/2014 3:38 PM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Malachi Mckenith	02680	945983	040 PCT
2. POM Manuel Gutierrez	15714	948589	040 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. SGT Willie Briggs	00362	933555	040 PCT
2. POM Edgar Clases	17447	936360	040 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Malachi Mckenith	Force: PO Malachi Mckenith used physical force against § 87(2)(b)	
B.POM Malachi Mckenith	Force: PO Malachi Mckenith used a chokehold against § 87(2)(b)	
C.POM Manuel Gutierrez	Force: PO Manuel Gutierrez used physical force against § 87(2)(b)	

Case Summary

On January 8, 2014, § 87(2)(b) had been arrested for an unrelated incident, and was being held in one of the 40th Precinct stationhouse cells. At approximately 5:30 p.m., PO Malachi McKenith, and PO Manuel Gutierrez then began taking prisoners out of their cells to be transported to Central Booking. When § 87(2)(b) was taken out of the cell, he stated that he became verbally resistant of the aggressive manner in which PO Gutierrez was searching him, especially near his groin. As a result, PO McKenith approached § 87(2)(b) and allegedly kned him in the groin, causing § 87(2)(b) to bend over in pain which was then followed by PO McKenith allegedly kneeing § 87(2)(b) on the right side of his head (**Allegation A**). § 87(2)(b) fell to the floor and PO McKenith allegedly punched § 87(2)(b) in the back of the head (within **Allegation A**). PO McKenith then allegedly placed his knee on the side of § 87(2)(b)'s neck while holding him down for three minutes (**Allegation B**). While still on the floor, PO Gutierrez allegedly punched § 87(2)(b) twice in the face, once in the nose and once in the mouth, causing a laceration to § 87(2)(b)'s lip (**Allegation C**). At that point Sgt. Briggs entered the cell area, at which point the force ceased.

Mediation, Civil, and Criminal Histories

- Since § 87(2)(b) suffered injuries as a result of this incident, mediation was not offered to § 87(2)(b) as an alternative resolution to his complaint.
- A Notice of Claim Inquiry was sent to the NYC Comptroller's Office on January 12, 2015. A response to this request will be added to the case file upon its receipt.
- § 87(2)(b), § 87(2)(c)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint filed by or involving § 87(2)(b) (encl. 2D)
- PO Gutierrez has been a member of the service for four years and this is the first complaint filed against PO Gutierrez. (encl. 2A)
- PO McKenith has been a member of the service for seven years and he has two substantiated CCRB allegations against him. In CCRB case # 201308493 the CCRB recommended instructions for substantiated allegations of threat of arrest, and offensive language. § 87(2)(g) two allegations of force had been unsubstantiated in a previous CCRB case, and two force allegations made in a case after this incident are currently being investigated by the CCRB. (encl. 2B-C)

Potential Issues

Throughout the course of this investigation, the undersigned had attempted to contact other prisoners within the 40th Precinct that may have witnessed the incident. Upon initial investigative steps the list of prospective prisoner witnesses was 25 names long (encl. 13A-D). After additional investigative steps, namely the acquisition of the correct command log (encl. 11A-W) naming the time and van number of prisoners being transported to Bronx Central Booking, the investigation was able to narrow the list of prospective witnesses to seven. Three of the

prisoners' (§ 87(2)(b) and § 87(2)(b) arrests have been sealed, making their date of birth, address, or phone number unavailable. Contact attempts were made to the other four arrestees encl. 13H-S), § 87(2)(b) and § 87(2)(b) as additional identifying information was available to the investigator at the time of the contact attempts. § 87(2)(b) was able to be contacted for a telephone statement, however the other three were unable to be reached through letters and telephone calls.

Findings and Recommendations

Explanation of Subject Officer Identification:

PO McKenith and PO Gutierrez admitted to their interaction with § 87(2)(b) alleged that it was specifically PO McKenith that held him down by placing his knee on § 87(2)(b)'s neck.

Allegation A- Force- PO Malachi McKenith used physical force against § 87(2)(b)

Allegation C- Force- PO Manuel Gutierrez used physical force against § 87(2)(b)

It is undisputed that § 87(2)(b) was taken out of his cell at the 40th Precinct stationhouse, and refused to be searched by an officer. It is undisputed that subsequent to this refusal, force was used against § 87(2)(b) by both PO McKenith and PO Gutierrez to gain control of § 87(2)(b). It is undisputed that § 87(2)(b) was punched at least twice in the face by an officer, causing at least a laceration to his upper lip. However, the sequence of events, including § 87(2)(b)'s level of resistance and the extent of the force used by the officers is currently in dispute. According to § 87(2)(b) he verbally contested how roughly PO Gutierrez was searching his groin area. § 87(2)(b) alleged that due to his verbal contention, PO McKenith approached him and kned him in the groin, causing § 87(2)(b) to bend over and then PO McKenith kned § 87(2)(b) on the right side of his head, causing § 87(2)(b) to fall to the floor. While on the floor, PO McKenith punched him on the back of the head, and PO Gutierrez punched him twice in the face before Sgt. Briggs entered the cell area, and they immediately ceased. Throughout, § 87(2)(b) denied that he resisted being handcuffed.

According to PO McKenith and PO Gutierrez, due to § 87(2)(b)'s non-compliance, PO McKenith attempted to search him anyway, and § 87(2)(b) slapped PO McKenith's hands away from him. The officers both state that PO McKenith then pushed § 87(2)(b) against the wall to search him. The officers differ on how § 87(2)(b) was placed against the wall. According to PO McKenith, § 87(2)(b) was pressed back first against the wall, according to PO Gutierrez, he was placed chest first. Both officers say that § 87(2)(b) continued to resist culminating in § 87(2)(b) swinging a closed fist at PO McKenith's face. PO McKenith and PO Gutierrez both stated that he blocked § 87(2)(b)'s punches, which came in succession, and both officers were consistent that they each punched § 87(2)(b) in the face, while § 87(2)(b) continued to swing at them. It should be noted that PO McKenith originally denied that PO Gutierrez punched § 87(2)(b) and later admitted that he did through additional questioning.

§ 87(2)(b) a prisoner who witnessed this incident but does not know § 87(2)(b) stated that § 87(2)(b) was asking for property from PO Gutierrez, resulting in a verbal argument between him and PO Gutierrez. As a result, PO McKenith approached, grabbed § 87(2)(b) by the shirt, spun him around, and pushed him against the wall. PO McKenith then held § 87(2)(b) there by the back of his neck, and began yelling at him. While § 87(2)(b) was being held, PO Gutierrez came from the side or behind and without provocation punched § 87(2)(b).

§ 87(2)(b) twice in the face, causing him to drop to the ground. Once on the ground the officers continued to punch § 87(2)(b) in the face. § 87(2)(b) denied that PO McKenith ever punched § 87(2)(b) in the face either while § 87(2)(b) was standing, or while he was on the ground. § 87(2)(b) did not state that PO McKenith kned § 87(2)(b) in the groin or head. § 87(2)(b) denied that § 87(2)(b) was resisting or ever swung at either of the officers. § 87(2)(b) also stated that a third officer, PO Clases, was involved in this incident and punched § 87(2)(b) in the face. However, the investigation determined by all other testimony, that PO Clases was not present for this incident.

The additional force used by PO McKenith and PO Gutierrez while § 87(2)(b) was on the ground is also in dispute.

According to PO McKenith, § 87(2)(b) continued to resist while on the floor by moving his arms and legs to prevent himself from being handcuffed. He stated that he and PO Gutierrez simply grabbed and pulled at his arms to place him in handcuffs and did not strike him any additional times while on the floor. PO Gutierrez stated that § 87(2)(b) did not continue to resist while on the floor and he and PO McKenith handcuffed him without having to use additional force.

According to § 87(2)(b) § 87(2)(b) was not resisting, and was being held down by PO McKenith while PO Gutierrez continued to punch § 87(2)(b) in the face. § 87(2)(b) also stated again that PO Clases participated in punching the non-resistant § 87(2)(b).

Though he did not witness the entire incident, Sgt. Briggs viewed the monitor near the front desk and saw PO Clases and PO Mckenith in the midst of a struggle with § 87(2)(b) before running to the cells. He stated that § 87(2)(b) had his back against the wall, and was pushing the officers hands away from him. However, Sgt. Briggs did not see § 87(2)(b) swing at either PO McKenith or PO Gutierrez. By the time he arrived at the cell area, § 87(2)(b) was on the floor. It is unlikely that the chronology of events presented by the officers, of § 87(2)(b) § 87(2)(b) swinging at them, and the officers then punching § 87(2)(b) in the face, then grappling with him to the ground could all occur in the time it took Sgt. Briggs to move from the front desk monitor to the cell area.

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NYPD Patrol Guide Procedure 203-11 stated that officers are required to use the minimum necessary force to overcome resistance, and when use of force against a subject becomes clearly excessive, officers are required to maintain control or intervene (encl. 1A-B).

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation B- Force- PO Malachi McKenith used a chokehold against § 87(2)(b)

§ 87(2)(b) alleged that PO McKenith held him on the floor by placing his knee on the side of § 87(2)(b)'s neck for a total of three minutes. § 87(2)(b) denied that this pressure on his neck restricted his breathing. PO McKenith stated that once § 87(2)(b) was brought to the floor he, PO Gutierrez, and additional officers assisted in handcuffing § 87(2)(b) by grabbing and pulling on § 87(2)(b)'s arms. PO Gutierrez stated that no additional force was needed after § 87(2)(b) was brought to the floor. Sgt. Briggs stated that he arrived as § 87(2)(b) was being handcuffed, and did not witness any force being used against § 87(2)(b).

As established above, Sgt. Briggs did not see any significant force being used against § 87(2)(b) but did state that officers were on their feet when he left the front desk, and then § 87(2)(b) and the officers were on the floor by the time he arrived at the cell area. § 87(2)(g)

NYPD Patrol Guide Procedure 203-11 explicitly prohibits the use of chokeholds. The definition of a chokehold includes, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce the intake of air (encl. 1A-B).

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§ 87(2)(g) [Redacted]
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Team: _____

Investigator:	_____	_____	_____
	Signature	Print	Date

Supervisor:	_____	_____	_____
	Title/Signature	Print	Date

Reviewer:	_____	_____	_____
	Title/Signature	Print	Date

Reviewer:	_____	_____	_____
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